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July 17, 2002

BY TELECOPY

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Civil Division, Torts Branch
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Re: *United States v. Philip Morris Inc.*, No. 99-2496 (GK) (U.S. District Court for the District of Columbia)

Dear Counsel:

This letter responds to the questions posed in Ms. Brooker's July 3 letter concerning the inadvertent loss of some email at Philip Morris Incorporated ("Philip Morris"). While these questions contain various objectionable, argumentative terms that mischaracterize the nature of the disclosure made in my June 19, 2002 letter to Judge Kessler, we will nevertheless provide information responsive to these inquiries in a spirit of cooperation. Again, however, I must take issue with the notion that it was somehow improper to notify Judge Kessler of this matter in the manner we did. We believe it was entirely appropriate under the circumstances.

(1) *On what date did a Philip Morris employee, or a representative or counsel of Philip Morris, first discover that files were destroyed? What, if any, immediate measures were taken?*

My June 19 letter to Judge Kessler disclosed the inadvertent loss of email at Philip Morris, not the "destruction" of "files." As explained in that letter, Philip Morris has a regular process instituted several years ago by the company's Information Systems personnel whereby email would be periodically deleted from the servers on which the company's email system operates. These system deletions occurred as part of a regular and accepted business practice that has been used for

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several years for the purpose of alleviating capacity constraints on the company's servers. Without such regular deletions, the servers' memory capacity would become overloaded, causing the servers to malfunction. These regular deletions only occur after advance notice to all affected employees. Thus, if all employees had followed the company's "print and retain" policy regarding relevant email, this process of regular system deletions would not have resulted in the loss of any email subject to the Document Preservation Order.

During the course of deposition discovery in this action, Philip Morris counsel received information which led them to conclude that some employees had not printed and retained all email on disposal-suspended topics, as required by the company's policy. After being advised of this information, Philip Morris suspended the periodic deletion of email described above in April 2002. Subsequent inquiries led to the determination that some email that was likely subject to the Court's Document Preservation Order had been lost. Some employees failed to properly manage their email (either by printing and retaining that email or by migrating it to folders that were not subject to deletion) in advance of the periodic system deletions that occurred prior to the time those deletions were suspended in April 2002. There have been ongoing efforts to identify means by which email subject to the Document Preservation Order that may have been lost could be recovered, which are described in greater detail below. However, because it appears that these efforts, while ongoing, will never allow Philip Morris to say with certainty that all such email has been recovered or otherwise preserved, Philip Morris disclosed this matter to the Court.

(2) How did it "come to the attention of Philip Morris that some e-mails of some employees had been inadvertently deleted without having been printed and retained?"

See the answer to No. 1 above.

(3) Who are the employees whose files were destroyed? Please provide a complete list with names and job titles.

Again, no "files" were "destroyed." Some email likely subject to the Document Preservation Order was lost through the process of periodic system deletions described above.

Because there are thousands of email users in the Philip Morris email system, and because Philip Morris is pursuing other remedial measures as described below, Philip Morris has not attempted to determine the status of each and every user's printing or other means of preserving email from periodic system deletion. At the time Philip Morris concluded that there was a possibility that disposal suspended emails may have been subject to periodic system deletion without having been printed or migrated to folders not subject to deletion, the periodic deletion process was suspended. Since April 2002, no periodic system deletions have taken place. Moreover, since that time, there have been ongoing efforts undertaken by Philip Morris to locate and identify methods and

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sources by which some of the lost emails could be recovered. These efforts are more fully described below.

(4) What are the facts that suggest that "it now appears some employees did not fully comply with that 'print and retain' policy?" Has Philip Morris determined which other employees are similarly situated?

See the answers to Nos. 1 and 3 above.

(5) What is Philip Morris' basis for believing that "it is likely that some of this e-mail was subject to the Document Preservation Order?"

The Document Preservation Order requires the preservation of "all documents or other records containing information potentially relevant to the subject matter of this litigation ..." Order #1, ¶ 7. While it is impossible for Philip Morris to determine with certainty that any email subject to the Document Preservation Order was lost as a result of the periodic system deletion process described above, the breadth of the Document Preservation Order, combined with the responsibilities of the employees involved in the deposition discovery process, makes it logical to assume that at least some lost email was subject to the Document Preservation Order. But, again, this is impossible to say with certainty, particularly in view of the fact that many emails authored by one employee were collected from the files of another employee. See the answer to No. 8 below.

(6) What was the existing preservation policy that was violated? Please provide a copy of the specific documents reflecting the policy that was violated.

Much of the information relevant to this inquiry was provided through the deposition testimony of William Lynch taken by the government on April 26, 2002. We reiterate and add to it here.

In response to the entry of the Court's Document Preservation Order on October 19, 1999, a document disposal suspension notice was issued on November 8, 1999 that explicitly referenced this litigation and summarized the smoking and health topics to which disposal suspension requirements applied. See November 8, 1999 Disposal Suspension Notice (2072513915-2072513916). These included:

- Research and development concerning tobacco or tobacco products.
- Related health issues, including ETS and fire safety.
- Chemical properties of tobacco, tobacco products or smoke.

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- Use of pesticides or genetic engineering in tobacco growth.
- Tobacco formulas, recipes or filter composition.
- Tobacco processing and testing.
- Cigarette manufacturing processes and methodologies with respect to tobacco or tobacco products that are manufactured and sold in the United States.
- The marketing and sale of tobacco or tobacco products in the United States (including information about advertising, promotions and consumer preferences); marketing plans and strategies (anywhere) (discussing which markets or segments to target and ways of reaching them); and marketing materials (anywhere) that discuss health claims or relate to youth smoking.
- Government regulation of tobacco products, including lobbying efforts, in the United States.
- Records retention, storage and disposal policies or practices.
- Routing policies or practices for communications between Philip Morris facilities in the United States and laboratories located outside the United States.
- Any other specific topics of already existing disposal suspension notices.

See id.

Consistent with already existing company policy, the November 8, 1999 Disposal Suspension Notice also specifically reiterated that electronic records, including email, subject to disposal suspension were also to be printed and retained. *See id.*

The November 8, 1999 Disposal Suspension Notice was part of a broader company records management program. At the time the Document Preservation Order was entered on October 19, 1999, Philip Morris had its Records Management Program in place, which was established in 1990 and last revised in 1993. This program, which was embodied in the Philip Morris U.S.A. Records Management Manual, controlled the retention and disposition of all Philip Morris records. *See Philip Morris U.S.A. Records Management Manual (June 1993) ("RMM"), at 4-1 (2500073009-2500073058).*

At all relevant times, the RMM imposed an obligation on employees to retain documents relating to the subject matter of the litigation. Thus, for example, all records concerning smoking and health have been under permanent disposal suspension since 1990, and those relating to ETS and cigarette-related fires have been under permanent disposal suspension since 1993. *See RMM,*

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Appendix A. Disposal suspension is "[a] procedure to stop, temporarily or permanently, the disposal of records . . . because they might be needed for an audit, investigation, court case or other specified reason." RMM, at 10-1. "[D]isposal procedures are immediately suspended [for those documents]". RMM, at 7-6. The policy provides that documents subject to disposal suspension "should not be disposed of, mutilated, or altered in any way." *Id.*

Philip Morris' records management program explicitly applies to email:

Upon receipt or notification of a Disposal Suspension Notice, it is imperative that all machine readable records (i.e., electronic, including email) as well as hard copies or copies on any other medium be suspended from the regular disposal process of the Records Management Program.

RMM, at 8-2; *see also* RMM, at 8-1 (discussing procedures governing retention of electronic mail). Company policy required that employees should retain all emails containing information that is subject to disposal suspension by "printing and retaining a paper copy only, in accordance with the usual retention practice. . . ." *See* Modification of May 4, 1994 Document Disposal Suspension Notice Requiring Retention of Electronic Mail and Other Electronic Records in Their Original Form (July 28, 1994), at 1 (2065378088-2065378089); *see also* RMM, at 8-2. Specifically, each employee is required to print and retain all email subject to document disposal suspension that he or she authored or, under certain circumstances, received. *See* Reformulation of Records Management Procedures Governing Retention of Identical Copies of Disposal-Suspended Records (April 1, 1998) (2063568613-2063568614); *see also* RMM at 7-7.

The foregoing summarizes the set of rules comprising Philip Morris' requirements governing the preservation of documents, including email, in connection with this litigation.¹

(7) *What were the specific instructions that Philip Morris counsel allegedly provided employees regarding the preservation policy? Please provide a copy of those instructions.*

Philip Morris' disposal suspension requirements, including the print and retain rule for email subject to disposal suspension, have been communicated to its employees repeatedly and in various ways over the last 10 years. For example:

- First, Philip Morris employees regularly receive Disposal Suspension Notices reminding them of existing categories of documents on Disposal Suspension or newly added ones.

¹ On February 1, 2000, Philip Morris established a new Records and Information Management Policy (2085184516) and distributed its Guide to Effective Information Management (2085184514-2085184543). This new policy, however, did not alter the set of document disposal suspension requirements described herein in any material respect.

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These notices are often sent in the first instance to Records Coordinators, who distribute them within their assigned departments. Disposal Suspension Notices may also be distributed in other ways. These notices typically include the following instruction: "If electronic Records can be printed (email, for example) you should print them and retain them only in printed form." In response to the entry of the Court's Document Preservation Order in this action, a document disposal suspension notice was issued on November 8, 1999 that explicitly referenced this litigation and summarized the smoking and health topics to which disposal suspension requirements applied. See November 8, 1999 Disposal Suspension Notice.

- Second, records management manuals (as well as any revisions or updates to the manuals) have been made available to Philip Morris employees, and the current manual, entitled the Guide to Effective Information Management, is also available on the company's intranet website.

- Third, the Legal Guide for Employees (2082805846-2082805887) along with the Business Conduct Policy (2072123216-2072123223) have been made available to employees. The Legal Guide, which is also available on the company's intranet website, requires employees to be in compliance with disposal suspension requirements.

- Fourth, Philip Morris offers training to its employees on records management, including disposal suspension.

- Fifth, Philip Morris' intranet website, available to employees, contains extensive information regarding the company's records management program. As noted above, the website contains the current records management manual, along with copies of the records management policy, a summary of the disposal suspension policy, and answers to frequently asked questions.

- Sixth, until the periodic system deletions of email from the servers on which the company's email system operates were suspended in April 2002, Philip Morris employees whose email was to be deleted would receive advance notice.

- Seventh, on the same day that I sent my June 19 letter for delivery to Judge Kessler, Philip Morris' Senior Vice President for Compliance, Greg Cummings, issued a memo to all Philip Morris employees reminding them of the need for compliance with the company's print and retain policy for email.

The foregoing is illustrative, but not exhaustive, of the instructions that Philip Morris employees have received regarding the company's document preservation policy.

(8) *What are the facts that form the basis for Philip Morris' assumption that "copies of e-mail not retained by one employee often have been retained by another employee?" List all employees who would have copies of such destroyed materials?*

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This is a logical assumption based on the massive scope of Philip Morris' document collection (which includes more than 964,000 email documents, of which more than 573,000 have been made available in this case). It is also supported by the fact that many emails authored by one employee have been made available in this case from the files of another employee. This necessarily suggests that these emails were retained by and collected from other employees.

(9) What are the facts that form the basis for Philip Morris' belief that "any failure to retain any relevant e-mail was entirely inadvertent and that no employee intended to circumvent either company policy or the Court's order?"

This belief is supported by the total absence of any information that would suggest that any employee knowingly and intentionally deleted any email that he or she knew was under disposal suspension and subject to the Court's Document Preservation Order.

(10) What are the facts that form the basis for your understanding that "some employees failed either to print the e-mail or migrate the e-mail to 'safe' locations on their computers before it was deleted?"

See answer to No. 1 above.

(11) What, if any, recovery effort of the e-mails are planned, attempted or underway?

Philip Morris has taken the following steps in an attempt to recover emails that may have been lost in connection with periodic system deletions:

- First, at the time such periodic system deletions were suspended in April 2002, the existing system backup tapes generated since the prior system deletion were secured and have been preserved. These tapes hold computer data, including all email contained on the Philip Morris computer system at the time the backup was made, going back until at least October 2001.

- Second, the company has also attempted to identify other potential sources where email otherwise lost through periodic system deletions might be found. Personnel from Philip Morris' Information Technology Service Center ("ITSC") have conducted a search for additional information, including system backup tapes, and found 51 such tapes in Philip Morris' Richmond, Virginia offices. While incomplete and difficult to restore, some of these tapes may contain email. ITSC personnel also collected certain hard drives and are currently scanning the hard drives to determine if any older email can be recovered.

- Third, when documents were collected in 2001 for Philip Morris' potential production in this and other smoking and health cases, the collection also included all electronic data on the

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computers of persons whose documents were undergoing collection, which would include email. Philip Morris has this electronic data, which totals, in a compressed (zipped) format, approximately 85 gigabytes of information; a portion of this is email.

Philip Morris is currently considering ways by which some or all of the email preserved by the foregoing means could be made available for production in this action in the near future, taking into account the possibly enormous volume of such email, the possibility that much of this email either may be nonresponsive, already produced in this action or duplicative, the difficulty of separating email that is responsive and not yet produced from that which is either not responsive or already produced in a timely fashion, and the technical difficulty, if not impossibility, of recovering at least some of this information.

(12) If the United States seeks to depose a Philip Morris employee about the destruction of the documents referenced in your letter, who are the persons most knowledgeable?

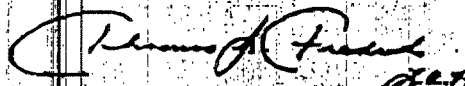
The persons most knowledgeable about the periodic system deletions that resulted in the inadvertent loss of email likely subject to the Document Preservation Order are representatives of ITSC. We will endeavor to identify the individual among them most knowledgeable on this subject and, subject to Court approval, make that individual available for deposition upon your request.

(13) Does this destruction of documents violate existing preservation orders in any other cases? If so, please provide copies of all relevant correspondence notifying the Court(s) and/or other parties.

Philip Morris does not believe that the inadvertent loss of email disclosed in my June 19 letter to Judge Kessler violates any other existing preservation order.

We stand ready to discuss this matter further with you, as requested in Ms. Brooker's July 3 letter.

Yours truly,



Thomas J. Frederick

TJF:me

cc: Defense Counsel

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